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Nos. 91-261, 91-274

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, ET AL., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JOHN M. STEVENS
ARTHUR G. TELEGEN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

CATHERINE L. FARRELL
General Counsel
STEVEN H. GOLDBERG
Associate General Counsel
Massachusetts Water Resources Authority
100 First Avenue
Boston, MA 02129
(617) 242-6000
Counsel for Petitioner Massachusetts Water Resources Authority

E. CARL UEHLEIN, JR.*
JAMES J. KELLEY
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Counsel for Petitioner Kaiser Engineers, Inc. and Co-Counsel for Petitioner Massachusetts Water Resources Authority

* Counsel of Record

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioners Massachusetts Water Resources Authority and Kaiser Engineers, Inc., hereby reply to Respondents' Brief in Opposition to the petition for writ of certiorari.

1. Respondents' opposition to the petition maintains adamantly but unsuccessfully that this Court has already decided the case. In fact, the Court's prior decisions provide no answers to the questions posed in the petition. The case law does not instruct when and whether this Court's preemption doctrine restricts the proprietary conduct of the states. Nor does it define in a fashion instructive here the reach of the *Machinists* doctrine. Were the law clear, the sharp divisions within the two circuits to have reached the issue presented here would not have occurred.

The opposition, by its silence, also confesses the lack of any evidence of congressional intent to support the court of appeals' finding of preemption. Only two sentences in the entire opposition even address the statute that allegedly preempts state action. And the sum of these sections, Section 2(2) which places the states beyond the reach of the NLRA, and Sections 8(e) and (f) which specifically authorize agreements in the private sector such as that challenged here, add up to exactly the opposite conclusion from that reached by the court of appeals.

2. The Respondents' efforts to cast the Agreement as the type of governmental regulation the Court has found to be preempted in the past ignore the fact that, to the contrary, the Agreement is a carefully considered procurement decision for a single project. As a result, their analysis of the economic consequences of the Agreement is flawed. Respondents contend the Agreement will increase the cost of the project. The sole basis for this contention in the record is identical statements in form affidavits executed by two officers of the Respondent association that on typical large projects their members can save as much as 20 percent on labor costs by flexible work rules and hours. J.A. 207, 217. The Boston Harbor Cleanup, they neglect to consider, is not a typical project.

The unrebutted record evidence of the economic consequences of the Agreement is set forth in the affidavit of the public official responsible for the timely progress of the project. Program Management Director Richard Fox points out that the project is being conducted pursuant to a detailed court-ordered schedule that makes no allowance for delay from labor disputes. J.A. 274-75. His own personal experience with labor disruption early in the project and his appreciation of the potential consequences of the simultaneous presence of numerous contractors and construction trades on a constrained site have demonstrated to him the susceptibility of the project to work stoppages. J.A. 275-81. In Director Fox's informed judgment, delays

from work stoppages would result not only in cost overruns but also in prolonged environmental harm. J.A. 281-82. His judgment is not mere speculation but has been proved in the marketplace. A determinative cost in any multi-billion dollar construction project is the cost of borrowing, and Director Fox has personal experience that the Agreement enhanced the marketability of the Authority's bonds in early 1990. J.A. 283-84.

The findings of the district court are consistent with the views of Director Fox. The purpose of the Agreement, the court found, was "to maintain the court-ordered schedule and avoid the risk of substantial fines for noncompliance." App. 75a. "In the absence of such an agreement," the court continued, the consequences would be "increased costs to the [Authority]." App. 75a-76a.

The question here is whether Congress would disapprove the Authority's managing the project as it sees fit, solely to permit Respondents both to bid on the project on their own terms and to maintain their non-union status. The Authority has not foreclosed Respondents from participating in the project; nor does it wish to do so. Rather, the Authority seeks only the right to purchase construction services on the terms it judges best suited to a single, unique construction project.

3. Respondents' contention that this Court should not grant review because the court of appeals' decision was rendered on appeal from the denial of a preliminary injunction and the case is therefore at an interlocutory stage is disingenuous. The court of appeals has decided that the Authority may not require prospective contractors to adhere to the Agreement as a condition for bidding for work. That decision has been rendered first by a panel and then by a divided court sitting *en banc*. This Court has not hesitated in the past to grant review in preliminary injunction cases, *see, e.g., Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987); *University of Texas v. Camenisch*, 451 U.S. 390 (1981);

Houchins, Sheriff of the County of Alameda, California v. KQED, Inc., 438 U.S. 1 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); and this case, presenting a pure issue of law, is well-suited for the Court's attention.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN M. STEVENS
ARTHUR G. TELEGEN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

CATHERINE L. FARRELL
General Counsel
STEVEN H. GOLDBERG
Associate General Counsel
Massachusetts Water
Resources Authority
100 First Avenue
Boston, MA 02129
(617) 242-6000
Counsel for Petitioner
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E. CARL UEHLEIN, JR.*
JAMES J. KELLEY
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Counsel for Petitioner
Kaiser Engineers, Inc.
and Co-Counsel for
Petitioner Massachusetts
Water Resources Authority

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* Counsel of Record